Metro Medical Group *and* Local 3082, American Federation of State, County and Municipal Employees, AFL–CIO. Case 7–CA–31064

February 21, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On December 4, 1991, Administrative Law Judge Hubert E. Lott issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, to modify the recommended remedy,[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Metro Medical Group, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The judge stated that employee witness Claudia Drohomirecki testified that she spent 90 to 95 percent of her time filling prescriptions after she was reclassified as a senior pharmacy specialist. The Respondent correctly notes in exceptions that this testimony referred to Drohomirecki's work at only one of its two facilities. Drohomirecki estimated that she spent 70 to 75 percent of her time filling prescriptions when working at the other facility. This factual correction does not affect the analysis of the unfair labor practice issues presented.

[2] The judge's recommended make-whole remedy is modified so that backpay shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Allen B. Rosenthal, Esq., for the General Counsel.
Stanley C. Moore III, Esq., of Troy, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. This case was tried in Detroit, Michigan, on May 7, 1991. The charge was filed on October 1, 1990, and the complaint was issued November 14, 1990.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company is a Michigan corporation, having a place of business in Detroit, Michigan, and several facilities located within the State of Michigan, where it is engaged in the operation of medical clinics. During the year ending December 31, 1989, a representative period, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $250,000. During the same period, Respondent purchased and received directly from points located outside the State of Michigan goods and materials valued in excess of $5000.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

In April 1981, the Charging Party (AFSCME, Local 3082) was certified to represent a unit of:

> All laboratory and X-ray technicians/technologists registered and non-registered, histologists, radioisotope technologists, laboratory assistants, pharmacy technicians and inhalation therapy technicians, employed by the Employer at its 1800 Tuxedo, Detroit; 4401 Conner, Detroit; 7701 Wyoming, Dearborn; 6550 Allen Road, Allen Park; and 28303 Joy Road, Westland, Michigan, facilities, who regularly work twenty (20) hours per week or more; but excluding department heads, assistant department heads, health center managers, all professional employees (including medical technologists A.S.C.P. registration, employees with advanced degrees (master's degree or better) in biology, microbiology and chemistry), all temporary employees, vacation replacement employees, guards and supervisors as defined in the Act, and all other employees.

Thereafter, AFSCME, Local 3082 and Respondent entered into a series of collective-bargaining agreements, the latest having a term from October 8, 1989, to October 8, 1992, and a recognition clause for:

> All laboratory and X-ray technicians/technologists registered and registry eligible, histologists, radioisotope technologists, jr. technicians, pharmacy technicians and inhalation therapy technicians hereinafter referred to as technicians-technologists hired on or before September 1, 1989, who regularly work twenty (20) hours per week or more, excluding all other employees listed in the collective-bargaining agreement.

Negotiations for the current agreement began in September 1989 and concluded in June 1990 and the agreement was executed on October 10, 1990, retroactive to October 8, 1989. The previous agreement was in effect during negotiations and the recognition clause contained pharmacy technicians.

Prior to October 15, 1990, Respondent's pharmacy department included pharmacy technicians represented by AFSCME, Local 3082 and cashier, clerk typist, storeroom

clerk, and pharmacy aide classifications represented by Local 600 UAW. There were two full-time pharmacy technicians and an unfilled part-time position.

The pharmacy department was beset with problems over crossing work jurisdictional lines. This in turn caused bickering between the two unions.

In 1989, Director of Labor Relations Delbert Davis met with Pamela Hyde, president of AFSCME, and Lois Feeney, president of UAW, Local 600, and told them that he would look into the possibility of reorganizing the pharmacy department. In October, Hyde testified that he told the parties that he might reorganize that department and AFSCME might lose two positions. In December he told the parties that he might reorganize that department and that, ''either unit might lose positions.''

At a meeting in September 1990, Davis informed Hyde that job classifications in the pharmacy department would be reduced to two classifications. A pharmacy aide classification would encompass the former job duties of the cashier, clerk typist, storeroom clerk, and pharmacy aide. The pharmacy technician classification would be changed to senior pharmacy specialist. Davis further advised Hyde that both classifications would be in the UAW unit. Hyde protested that the pharmacy technician classification was part of her unit and he could not just arbitrarily take it away and give it to the UAW. Davis said that he had that right under the management-rights clause in the contract.

On October 1, 1990, Davis again met with Hyde and reiterated what he said in September and further stated that based on the management-rights clause in the contract he was formally advising her that as of October 15, 1990, the pharmacy technicians were being removed from the AFSCME unit and included in the UAW unit as senior pharmacy specialist. Hyde protested asserting that this was a bargaining issue and on October 2, 1990, she filed a grievance over the removal of the pharmacy technicians from the bargaining unit.

Hyde testified that the job duties of the pharmacy technician were the same of those of the senior pharmacy specialist with the exception of taking money from customers which the latter could do after reorganization.

Claudia Drohomirecki is senior pharmacy specialist, a member of the negotiating committee and a former pharmacy technician who was informed on October 10, 1990, by Davis that she would be moved from the AFSCME unit on October 15, 1990, and included in the UAW unit. She testified that her job duties remained the same except, that after the move she could take money from customers in payment for prescriptions. She further testified that in both jobs she spent 90 to 95 percent of her time filling prescriptions.

The undisputed evidence indicates that neither party requested negotiations over the reorganization and or removal of the pharmacy technician from the unit, nor was the subject ever raised during contract negotiations.

Analysis and Conclusions

Respondent asserts two defenses in support of its action in removing a classification from the certified unit. First, it argues that it has the contractual right to remove the classification by virtue of a management-rights clause, article 4, section A, which reads:

> The Metro Medical Group management shall have the full and exclusive right to manage and operate its facilities, all operations and activities including, but not limited to the direction and scheduling of its working force, of employees the right to . . . discontinue and reorganize any department.

Article 4, section C, provides:

> Management agrees to discuss with the Union the discontinuance or reorganization of any department in which union employees are employed before such action takes place.

Second, Respondent argues that the Charging Party waived its right to object to the elimination of the classification by its failure to seek negotiations after being informed of the reorganization plans by the employer.

It should be noted at the outset that there is no assertion that the elimination of the classification involved change in duties which are dissimilar from those duties of employees of the unit, because the evidence does not support such assertion.

After reviewing the management-rights clause in the contract, I can find nothing that supports Respondent's argument that it had a unilateral right to alter the bargaining unit. In fact, the management-rights clause does not address that issue. The clause merely gives Respondent the right to discontinue and reorganize the departments. That is not at issue.

Respondent's waiver argument is also unpersuasive. Respondent claims the Charging Party waived its right to bargain over the elimination of the classification from the unit. However, it takes more than bargaining to change the scope of the unit. It takes mutual agreement or Board action. *Arizona Electric Power*, 250 NLRB 1132 (1980), *Carolina Telephone & Telegraph Co.*, 258 NLRB 1387 (1981). The Union certainly never agreed to the change. In fact, the Charging Party objected every time the subject was raised and finally filed a grievance over Respondent's unilateral action.

The Union never clearly and unambiguously waived its right to bargain over the change. There is merit to the General Counsel's argument that when the issue of bargaining arose, Respondent asserted its right under the management-rights clause to make a unilateral change. This effectively precluded any meaningful bargaining.

Accordingly, I find that Respondent, by removing pharmacy technicians and/or senior pharmacy specialists from the unit on October 15, 1990, withdrew recognition from and refused to bargain with the Union as the representative of employees in the unit for which the Charging Party is the exclusive bargaining representative, in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Metro Medical Group is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 3082, American Federation of State, County and Municipal employees, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All laboratory and X-ray technicians/technologists registered and registry eligible, histologists, radioisotope technologists, jr. technicians, pharmacy technicians and inhalation therapy technicians, hereinafter referred to as technicians/-

technologists hired on or before September 1, 1989, who regularly work 20 hours per week or more, excluding all other employees listed in the current collective-bargaining agreement is the unit for which the aforesaid union is the exclusive bargaining representative.

4. Pharmacy technicians and/or senior pharmacy specialists are a part of the aforesaid unit.

5. By removing pharmacy technicians and/or senior pharmacy specialists from the bargaining unit on October 15, 1990, Respondent withdrew recognition from and refused to bargain with the aforesaid Union as the exclusive bargaining representative and thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The above unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent had committed no other unfair labor practices.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent, in violation of its duty under Section 8(a)(5) and (1) of the Act, withdrew recognition from and refused to bargain with the Union as the representative of employees, including pharmacy technicians and/or senior pharmacy specialists, in the unit for which the Union is the exclusive bargaining representative, I shall order it to bargain collectively with the Union by restoring senior pharmacy specialists to the unit and by applying terms of the collective-bargaining agreement to them. Additionally, I shall order Respondent to make senior pharmacy specialists whole for any loss of pay, benefits, or other rights and privileges they may have suffered as a result of Respondent's unfair labor practices. Backpay, if any, shall be computed with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Metro Medical Group of Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition and refusing to bargain with Local 3082, American Federation of State, County and Municipal Employees, AFL–CIO as the representative of employees in the following unit, which includes pharmacy technicians/senior pharmacy specialists, for which the Union is the exclusive bargaining representative:

> All laboratory and X-ray technicians/technologists registered and registry eligible, histologists, radioisotope technologists, jr. technicians, pharmacy technicians (senior pharmacy specialists) and inhalation therapy technicians, hereinafter referred to as technician/technologists hired on or before September 1, 1989, who regularly work twenty (20) hours per week or more, excluding all other employees listed in the collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain collectively with the Union as the exclusive bargaining representative of employees in the above unit by restoring the pharmacy technicians and/or senior pharmacy specialists to the unit and by applying the terms of the collective-bargaining agreement.

(b) Make pharmacy technicians and/or senior pharmacy specialists whole for any loss of pay, benefits, or other rights and privileges they may have suffered as a result of Respondent's unfair labor practices in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in Detroit, Michigan, copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with Local 3082, American Federation of State, County and Municipal Employees, AFL–CIO as the exclusive collective-bargaining representative of our employees in the following appropriate unit and to honor and apply the current collective-bargaining agreement with the Union, which is effective until October 8, 1992, and covers the following unit for which the Union is the exclusive bargaining representative:

All laboratory technicians/technologists registered and registry eligible, histologists, radioisotope technologists, jr. technicians, pharmacy technicians (senior pharmacy specialists) and inhalation therapy technologists, hereinafter referred to as technicians/technologists hired on or before September 1, 1989, who regularly worked twenty (20) hours per week or more, excluding all other employees listed in the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain collectively with the Union as the exclusive bargaining representative of employees in the above unit by restoring the pharmacy technicians (senior pharmacy specialists) to the unit and by applying the terms of the collective-bargaining agreement to them.

WE WILL make pharmacy technicians (senior pharmacy specialists) whole for any loss of pay, benefits, or other rights and privileges they may have suffered as a result of our unfair labor practices in the manner set forth in the remedy section of this decision.

METRO MEDICAL GROUP